APPENDIX.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Entered July 5, 1967.)

On consideration of the motion of Plaintiff-Appellee to revoke bail and the memorandum of Defendants-Appellants in opposition to the motion, it appears that bail in this case was allowed by the District Court. The motion to revoke bail should, therefore, in the first instance be directed to that Court. The motion will, therefore, be denied without prejudice to renewal in the District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

MOTION TO SHOW CAUSE IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Now comes the United States of America, by and through Merle M. McCurdy, United States Attorney, and Nathaniel R. Jones, Assistant United States Attorney for the Northern District of Ohio, and pursuant to the provisions of Rule 46(a)(2) of the Federal Rules of Criminal Procedure, respectfully moves this Court for an Order directing defendant-appellants, Vincent Serman and Lenine Strollo, to show cause why bail previously set by this Court in this matter should not be revoked.

MERLE M. MCCURDY,
United States Attorney,

BY NATHANIEL R. JONES,
Asst. U. S. Attorney.

MEMORANDUM.

It has been almost four years since the conviction of Lenine Strollo and Vincent Serman in the United States District Court, which was in July, 1963. Defendant-appellants have unsuccessfully taken appeals from this Court to the Court of Appeals and to the United States Supreme Court, which denied writs of certiorari.

Defendants-appellants' motions for new trials on grounds of newly-discovered evidence were denied by the District Court and the denials affirmed by the United States Court of Appeals for the 6th Circuit.

In response to a motion filed by the United States of America in the 6th Circuit Court of Appeals to revoke bail of Serman and Strollo, the Court denied same without prejudice on July 5, 1967. However, the Court of Appeals said (see Exhibit A):

> "The motion to revoke bail should * * * in the first instance be directed to [District Court]. The motion will, therefore, be denied without prejudice to renewal in the District Court."

The Court has jurisdiction under the provisions of Rule 46(a)(2) of the Federal Rules of Criminal Procedure to revoke the order admitting the defendants to bail at any time, and in view of the length of the appeals that have been taken by the defendants-appellants, the United States of America is of the view that the orderly administration of justice requires that bail be revoked forthwith.

Respectfully submitted,

MERLE M. MCCURDY,
United States Attorney,

NATHANIEL R. JONES,
Asst. U. S. Attorney.

ORDER TO SHOW CAUSE.

(Entered July 7, 1967.)

On the Motion of the United States of America, by and through Merle M. McCurdy, United States Attorney, and Nathaniel R. Jones, Assistant United States Attorney for the Northern District of Ohio,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendant-appellants, Lenine Strollo and Vincent Serman, show cause on Friday, July 14, 1967, at 9:30 A.M. as to why bail previously set by this Court in this matter should not be revoked.

GIRARD E. KALBFLEISCH,
United States District Judge.

MEMORANDUM OPPOSING MOTION TO REVOKE BAIL.

This case is now pending in the United States Supreme Court on a petition for writ of certiorari to the United States Court of Appeals, Sixth Circuit.[1] The petition was filed on July 1, 1967.

On December 10, 1965, this Court overruled motions by the defendants for a new trial without opinion. Defendants appealed that order (United States Court of Appeals for the Sixth Circuit Nos. 17,057; 17,058), and the Court of Appeals affirmed the order of the District Court without opinion. Petition for rehearing was likewise over-

[1] A copy of the petition and separate appendix is annexed hereto and marked Exhibit "A." The certified record of appeal proceedings and appendix were filed with the petition. (October, 1967—No. 320.)

ruled. (See pages 31-33, Exhibit "A".) On June 5, 1967, defendants filed a motion in the United States Court of Appeals "to stay mandate pending appeal to the United States Supreme Court." [2] In that motion defendants and counsel certified that the appeal was to be filed in good faith and for good cause and not for the purpose of delay.[3] The United States Attorney opposed the motion. Defendants filed a memorandum opposing the position taken by the United States Attorney.[4] On June 15, 1967, the Court of Appeals stayed the mandate pursuant with Rule 24(3), Title 28, U.S.C.A.[4a] The United States Attorney filed a "motion to revoke bail" *in the Court of Appeals.* Defendants opposed that motion.[5] The instant motion by the United States Attorney is a resurrection of the motion filed in the Court of Appeals. The instant motion admits that the Court of Appeals overruled the motion.

The United States Attorney invokes Rule 46(a) (2), Federal Rules of Criminal Procedure, as the basis for his motion. He seeks to require defendants to "show cause why bail previously set by this Court * * * should not be revoked." He does not set out grounds for the motion, such as violation of conditions of bail, nor does he set out facts that would urge the Court to consider the matter of bail at this time. Bail should be denied *only in cases* in which, *from substantial evidence, it seems clear* that the right to bail may be abused or the community may be threatened by the applicant's release. *Leigh v. United States,* 8 L. Ed. 2d 269, 271; 82 S. Ct. 994.

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[2] Exhibit "B" annexed hereto.

[3] United States Court of Appeals for the Sixth Circuit, Rule 24(3), Title 28, U.S.C.A.

[4] Exhibit "C" annexed hereto.

[4a] Exhibit "D" annexed hereto.

[5] Exhibit "E" annexed hereto.

The facts in the instant case are *clear* that defendants have been available at all Court proceedings. In fact, it is necessary that defendant, Vincent Serman, directly participate in all proceedings. Further, bail was granted in the first instance by the Honorable Ben C. Green; then on February 1, 1965, this Court sustained a motion for stay of execution of sentence and continued bail pending further appeal. The matter was again passed upon by the Court of Appeals (See Exhibit "D" herein, and Exhibit "A" instant motion). Surely the United States Attorney does not wish to urge upon this Court the untenable argument that the Court of Appeals was not mindful of the requirements of Rule 46(a) (2), Federal Rules of Criminal Procedure, in passing on the defendant's motion to stay the mandate. It is obvious on the face of the record, that the Circuit justices made no finding that the appeal here was not sought in "good faith." Hence, unless it be made to appear that the appeal is frivolous or taken for delay, *bail should be granted.* The criteria by which an application for bail pending appeal are (1) whether the appeal is not frivolous and (2) whether it is not taken for delay. *Leigh v. United States,* 8 L. Ed. 2d 269, 271; 82 S. Ct. 994. Hence, it follows that in a case such as the instant case where the Government does not contend that there is a likelihood that defendants will flee the jurisdiction,[6] that the crime involved is nonviolent, that participation is required by defendants in preparation, and investigation clearly shows that the order permitting bail (by the District Court) and the order staying the mandate (by the Court of Appeals) should not be disturbed without a

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[6] The posture of the case and the ever presence of the defendants at all proceedings also show the defendants' faith in their cause, as well as consistent efforts to ferret out the whole truth of the matter.

strong showing by the Government. The burden should be upon the Government. (cf. *Rhodes v. United States*, 275 F. 2d 78 (1960); *United States v. Piper*, 227 F. S. 735 (1964).)

In defendants' memorandum opposing the Government's motion to revoke bail in the Court of Appeals (Exhibit "E"), the difference between *United States v. Johnson*, 327 U. S. 106 (1946) (the position taken by the Government) and *Remmer v. United States*, 350 U. S. 377 (1956)[7] (the position taken by defendants) shows by one example the probabilities that this case will commend itself to at least four of the justices of the United States Supreme Court.[8]

The Government seems to have lost sight of the amendments to Chapter 207 of Title 18 U.S.C., generally referred to as the Bail Reform Act of 1966, in pushing this matter. (See Barrow Federal Practice and Procedure, Rules Edition, Volume 4, 1966 Pocket Part, page 182.)

> "Three months later, on September 20th, the Bail Reform Act of 1966 became effective. Section 2 of that act says that its purpose is 'to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.'"

The Federal Courts should not become an arena for an unfair "game" where Government forces with prestige,

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[7] There were two *Remmer* cases before the Supreme Court: 347 U. S. 227; 350 U. S. 377. Same parties on two separate appeals as in the instant case.

[8] Jurisdiction of that Court for the instant case is set forth at pages 1-2, Exhibit "A." The questions presented at pages 3-4, ibid.

great weight and a great preponderance of facilities match wits with nearly helpless defendants defending themselves without funds.

Respectfully submitted,

JOHN J. KANE, JR.,
DUFFY & HESSE,
VINCENT SERMAN,
Defendant Pro Se.

TRANSCRIPT OF PROCEEDINGS AT ORAL HEARING ON MOTION TO SHOW CAUSE BEFORE HON. GIRARD E. KALBFLEISCH, JUDGE OF SAID COURT, ON FRIDAY, JULY 14, 1965, AT 9:30 O'CLOCK A.M.

APPEARANCES:

On behalf of the Government:

NATHANIEL R. JONES, *Assistant U. S. Attorney.*

On behalf of the Defendants-Appellants:

MESSRS. KANE, RAY & ELDER, by
JOHN J. KANE, JR., ESQ.

MESSRS. DUFFY & HESSE, by
DAN W. DUFFY, ESQ., and
SYDNEY A. HESSE, ESQ.

* * * * *

(22) The Court: How do you contend, Mr. Kane, that the present status of your case does not fall within the frivolous character or delay of appeal, when the law specifically provides that when a motion for a new trial is filed when a case is pending on appeal in the Circuit Court, that the District Court has no authority unless the case is remanded by the Court of Appeals to the District Court—which was not done in this case.

Now, you are appealing from the fact that I overruled the motion for a new trial on newly-discovered or suppressed evidence.

Mr. Kane: Yes, Your Honor.

(23) The Court: Without an opinion.

Mr. Kane: That is correct.

The Court: Now, the rule is clear and unequivocal, that when a case is on appeal in the Court of Appeals, this Court has no jurisdiction over the case. And unless the Court of Appeals, where your appeal is pending, remands the case for this Court to hear your motion for a new trial—that you are now presently taking to the Supreme Court—I have no jurisdiction at all in it. Now, it is that judgment of mine that you are appealing, which the Court of Appeals affirmed; and you haven't even got a prayer to stand on.

Now, if you will look at the rule, Rule 33 provides:

"The court on motion of the defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly-discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand (24) of the case."

Now, how do you get around that? Have you read Rule 33? Neither one of you cited it to me.

Now, the only reason I am calling it to your attention is that when you people filed this, I naturally felt that it deserved my fullest study and consideration. But I ran immediately head-on into the provision of Rule 33: there

was no remand; there wasn't anything for me to do but to overrule the motion.

Now, perhaps I should have written some memorandum advising counsel before they could get me to rule upon this, they should get a remand from the Court of Appeals. But I don't think I owe the obligation to lead counsel around by the hand.

Mr. Kane: Your Honor please, I was not in this case from the beginning; but my understanding is that the Supreme Court had ruled before the motion for new trial on the ground of newly-discovered evidence was filed in this Court, and that was after the ruling. Therefore,—

The Court: No. Your case was in the Court of Appeals, was it not? Weren't you before the Court of Appeals on a motion for rehearing when the motion for a new trial on newly-discovered evidence (25) was filed in this case?

Mr. Kane: No. No, your Honor, it was—

The Court: Well, I have got another case going.

I will take it under advisement.

I will look into this further, and let the Government have time to file a responsive memorandum to this memorandum which you filed, Mr. Kane.

Mr. Kane: All right. Thank you.

The Court: Mark the cause submitted.

We will recess for five minutes before we resume the other case.

(Recess had.)

* * * * *

RESPONSE TO MEMORANDUM OF DEFENDANTS RE: BAIL REVOCATION.

Now comes the United States of America by and through Merle M. McCurdy, United States Attorney, and Nathaniel R. Jones, Assistant United States Attorney, and with leave of Court, submits the following response to the memorandum of defendants of July 12, 1967.

The United States concedes the accuracy of the narrative in paragraphs one and two of defendants' memorandum with two exceptions, and takes issue with assertions and conclusions throughout same. The United States denies the truthfulness of the representations that 1) the appeal is in good faith, for good cause, and not for purposes of delay; and 2) the government's motion is merely a resurrection of a motion previously filed in and denied by the 6th Circuit Court of Appeals.

The United States takes the position that the defendants' appeals are frivolous, not in good faith, not for good cause, and are for purposes of delay. 1) The government's contention that the appeals are frivolous, etc. is based on the fact that:

A) The judgment of conviction was entered on July 23, 1963. An appeal bond of $25,000.00 was fixed by the trial judge. (See Exhibit A)

B) The Court of Appeals, in November, 1964, affirmed said conviction. Rehearing denied. (Exhibits B and B-1)

C) On May 27, 1965, the United States Supreme Court denied defendants' petitions for writs of certiorari.

D) On October 11, 1965, rehearing was denied by the Supreme Court.

E) Motions for new trials on grounds of newly-discovered evidence filed by defendants in U. S. District Court on October 15 and October 18, 1965. The

cases had not been remanded as of this date. (See Exhibits A, H and I)

F) On December 10, 1965, motions for new trials were, upon consideration, overruled by District Judge Girard E. Kalbfleisch. Cases had not been remanded as of this date and no remand sought by the Court.

G) On December 13, 1965, rulings by Judge Kalbfleisch appealed to the 6th Circuit Court of Appeals on grounds that it was improper to deny same without a hearing.

H) On March 29, 1967, one week before oral arguments, defendants filed a motion with the Court of Appeals asking for an order compelling the United States to disclose whether any electronic surveillance had occurred in the investigation of their cases.

I) The United States immediately responded in the negative on March 31, 1967, with an affidavit by the Asst. United States Attorney. (Exhibit C)

J) Oral arguments heard in the Court of Appeals on order overruling motions for new trials on newly-discovered evidence without hearing, and on the issue of electronic surveillance.

K) On May 5, 1967, the Court of Appeals held that the District Judge had not abused his discretion in denying defendants' motions for new trials and further denied their motion for order of disclosure of electronic surveillance. (Exhibit D)

L) On July 1, 1967, petition for writ of certiorari filed in the Supreme Court.

M) The appeal for which the bond was fixed by the District Judge has been exhausted. The present appeal is separate and distinct from the judgment of guilt which the appellate courts reviewed and affirmed following conviction.

N) Rule 33, F.R.C.P., relating to new trials on grounds of newly-discovered evidence in cases on appeal, restricts the granting of same unless the trial

court first requests a remand of the case, in the event it has not been remanded at the time motions are considered. However, at any time, without requesting a remand, the trial court may overrule the motions.

United States v. West, 170 F. Supp. 200 at 204; *United States v. Comulada,* 340 F. 2d 449 at 452; *Ashe v. United States,* 288 F. 2d 725 at 733.

O) The state of the law is such that when a District Court, upon consideration, overrules motions for new trials on grounds of newly-discovered evidence in cases on appeal, it does it for two reasons:

1) The motions lack merit, therefore no remand is being requested.

2) Lack of jurisdiction.

2) Defendants assert that the United States is merely resurrecting a motion previously filed in the Court of Appeals. Defendants certainly must be aware of the language of the order of the Court of Appeals in this regard. The Court clearly stated that its ruling was without prejudice to it being renewed in the District Court, since this is the Court that orginally fixed the appeal bond. (See Exhibit A of government's Motion to Show Cause.)

District Court's Authority to Revoke Bail.

Rule 46(a)(2) of the Federal Rules of Criminal Procedure confers upon the trial judge authority to continue bail upon appeal. Further, said rule clearly confers upon a judge who sets bail authority to revoke it:

"Any court or judge * * * authorized to grant bail may at any time revoke the order admitting the defendant to bail."

This Court obviously fixed an appeal bond in order that the defendants could remain free to prosecute appeals

of their judgments of convictions. Those appeals have now been exhausted. The appeals presently pending in the Supreme Court are collateral in nature. They are an appeal of this Court's refusal to grant them a hearing on their motions for new trials on grounds of newly-discovered evidence.

This fact brings us face to face with the question of this Court's desire to permit the bail it set for the original appeal to be used during a dilatory and frivolous maneuver by the defendants. In considering that question we note that Rule 46 does not grant a District Judge power to set an appeal bond pending certiorari to the Supreme Court. This is the limiting language of the Rule:

> "Pending appeal or certiorari to the Supreme Court, bail may be allowed by the Court of Appeals or by any judge thereof, or by the Supreme Court or by a Justice thereof."

Significantly, no mention is made of a District Judge in the foregoing quote from 46(a)(2).

It seems clear beyond any doubt that Rule 46 gives the District Court authority to revoke an appeal bond which it previously fixed. However, the Court of Appeals and/or the Supreme Court are given power to fix bail in cases "pending appeal or certiorari to the Supreme Court." Therefore, those courts should be the forums from which bail ought now to be sought by defendants, if indeed, bail is to be fixed.

This brings us to a consideration of the nature of the appeal to determine whether it has a frivolous character.

The government is of the view that the appeal is frivolous and for purposes of delay because the trial court had no jurisdiction to grant the motion for a new trial under the circumstances. At the times the motions were filed and considered, the cases had not yet been remanded

to the District Court. In considering the motions, the Court concluded, among other things, that they were lacking in merit. If they had been meritorious the Court would have sought a remand from the court before whom the cases were pending in order to grant the motions. (See opinion by J. Weick in *West v. United States, infra.*) No such procedure is required to overrule this type of motion in cases not yet remanded.

The Court will note from the brief filed in the Court of Appeals by the United States (Exhibit F) that the position was taken that the same judge to whom the motions for new trials had been submitted, was the same one who presided at the trial. He was in a position, therefore, upon considering the motions on their faces, to evaluate the assertions therein and to grant them as valid or reject them as invalid. The Court rejected them. The Court of Appeals held that this rejection did not constitute an abuse of discretion. (See Exhibit D.) In view of the foregoing, the United States concludes that the appeals, the effort to remain free on bail pending an ultimate determination of them, are geared solely for delay. The District Court has every justification as well as authority to revoke the bail which it set at the time of conviction. Should the Supreme Court feel that the defendants should be free on bail, then that Court or a Justice thereof is empowered to fix bail.

The orderly administration of justice requires that defendants not be permitted to carry on an endless series of collateral attacks upon their judgments of conviction, and then use pendency of those proceedings as justification for remaining at large. There is nothing about the petition for writ of certiorari that entitles the defendants to remain free on the original appeal bond. (See Exhibit G—C.A. Order, *United States, v. Hoffa.*) The Supreme Court will act on the basis of the record already made and

the pleadings submitted. Therefore, defendants have no role to play. Defendant Serman argues that he must "directly participate in all proceedings." He failed to state the reasons calling for his direct participation, or the nature and degree of such participation. This assertion is open to challenge in view of the fact that defendant Serman has been to this point represented by three counsel.

Defendants in their memorandum suggest that the Court of Appeals must have been mindful of Rule 46(a)(2) when it stayed the mandate and that, therefore, this Court should not revoke the bail. In reply, we again cite to the Court the language of the Court of Appeals order in directing that the question of bond revocation be first presented to this Court. (See Exhibit A—Motion for Show Cause Order.) It cannot therefore be said that the Court of Appeals has foreclosed action by this Court.

Defendants argue the proposition that this Court is practically enjoined by decided cases from disturbing the bail it previously set. Such a proposition is fallacious, borne of mis-reading or a non-reading of 46(a)(2). The *Rhodes* and *Piper* cases cited by defendants do not deal with the situation we have here. Those decisions treat instances of post-conviction bail, not cases where convictions have been affirmed. The *Remmer* cases, also cited, are not relevant to the instant question. Those cases involve a matter of a juror being interrogated by the F.B.I. during the recess of the trial. That factual and legal proposition has no pertinence or relevance to the issue here.

The Bail Reform Act referred to by defendants in their memorandum contains no predicates upon which defendants at this stage can rely. That Act is designed to assure that persons not be lodged in jail before adjudication of their guilt. The Act is not aimed at freeing forever persons who have unsuccessfully exhausted appeals of

their judgments of conviction, and who choose to unleash an endless barrage of collateral attacks. Defendants have every right to mount those attacks, but they should be done from jail—not while at large under bail which was not fixed for that purpose.

Conclusion.

The Court is respectfully urged to exercise its powers under Rule 46(a)(2) and revoke the bail which it set in CR 63-50 at the time of their conviction in July, 1963, for the reason that they are using that bill to delay and prolong, through means of frivolous appeals, the conclusion of their cases. Their convictions have been appealed and affirmed. As of this moment the defendants stand convicted of the crimes charged. There is no presumption of innocence operating in their favor any longer.

Therefore, this Court should terminate the bail previously set for the appeal since that appeal has been exhausted.

Respectfully submitted,

MERLE M. MCCURDY,
United States Attorney,

By NATHANIEL R. JONES,
Asst. U. S. Attorney.

LETTER, JULY 27, 1967, JOHN F. DAVIS, CLERK, TO HON. THURGOOD MARSHALL.

July 27, 1967

Hon. Thurgood Marshall
Solicitor General of the U. S.
Washington, D. C.

Re: Serman & Strollo v. U. S.
No. 320, Oct. Term, 1967

Dear Mr. Marshall:

The request contained in your letter of July 25, 1967, for an extension of time to file a response to the petition for writ of certiorari in the above entitled case has been granted and the time extended to and including September 1, 1967.

Very truly yours,

JOHN F. DAVIS, *Clerk*,
By E. P. CULLINAN,
Chief Deputy.

EPC: njf
CC: Mr. John J. Kane, Jr.
1405 The Superior Bldg.
Cleveland, Ohio 44114

LETTER, AUGUST 7, 1967, JOHN J. KANE, JR., AND DAN W. DUFFY TO HON. G. E. KALBFLEISCH.

KANE, RAY AND ELDER
The Superior Building
Cleveland, Ohio 44114
August 7, 1967

The Honorable G. E. Kalbfleisch
Judge, United States District Court
Northern District of Ohio
Eastern Division
Federal Building
Cleveland, Ohio 44114

In re: United States of America
v. Lenine Strollo and
Vincent Serman
No. CR 63-50

Dear Judge Kalbfleisch:

Some clarification of the United States Attorney's "response" is in order.

When the Supreme Court of the United States denied rehearing on October 11, 1965, that was the final judgment under Rule 33 of the Federal Rules of Criminal Procedure.

No mandate issues. See Supreme Court Rule 59(3).

No remand can be entered or requested by any court after final judgment.

Since the final judgment was entered by the Supreme Court of the United States on October 11, 1965, the motions for new trial on the grounds of newly discovered evidence filed on October 15, and 28, 1965, were timely and within the two years under Rule 33 of the Federal Rules of Criminal Procedure.

If a case is on appeal, a motion on the grounds of newly discovered evidence can be *granted* only on remand. *Richardson v. United States*, 360 F. 2d 366 (C. A. Ala. 1966). If the development for the grounds for the motion occur in the Court of Appeals, the procedure, as outlined in *United States v. Smith*, 331 F. 2d 145 (6th Cir. 1964), must be followed.

The erroneous statement with reference to remand, as set out by the United States Attorney in Item 1)F) of his "response," should be disregarded.

The word "remand" is defined by the Supreme Court of the United States in *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 373:

> "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points."

The United States Attorney's office contends the cases are pending too long, and the appeal lacks merit, and then the United States Attorney proceeds in paragraph 3, on page 4 of his "response," to state his only reason why the appeal is frivolous. A careful reading of paragraph 3 leads one to believe that the Government is attempting to mislead the Court for the reason that each of the statements alleging frivolity is erroneous and not in conformity to Rule 33 of the Federal Rules of Criminal Procedure or annotations thereunder. A frivolous appeal presents no justiciable question * * * and so recognized as devoid of merit.

There was attached to and made a part of the motion for new trial a sworn statement of Mrs. Socie before an

official court reporter.* Also, and of utmost importance, a request for an oral hearing was made in the motion for new trial "so that testimony in support of this motion may be presented."

In *Remmer v. United States*, 347 U. S. 227, 229 (1954), a motion for new trial on the grounds of newly discovered evidence was filed requesting a hearing. The Supreme Court said at page 229:

> "The Government did not file answering affidavits. The District Court without holding the requested hearing, denied the motion for a new trial. * * * The trial court should not decide and take final action ex parte on information such as was received in this case, * * *."

The defendants in this case sincerely believe that the charges against the named detective, unanswered by the Government, as well as the other unanswered charges in the motion for new trial supported by the record transcript, require a hearing.

The standing of the defendants in this case is further buttressed by another Supreme Court case, *Surowitz v. Hilton Hotels Corp.*, 383 U. S. 363 (1966). (A civil stockholder's derivative suit summarily dismissed by the District Court despite the fact that affidavits had been filed explaining pre-investigation.):

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* Mrs. Socie's husband and a defendant, John Paladinich, are named as the source of the counterfeit money. Detective Bernat who testified at the trial took a statement from Mr. Socie before the trial, but did not divulge that information. Defendant, John Paladinich, testified he had not had any intimation of consideration for testifying. After the trial, John Paladinich was placed on probation.

Detective Bernat, although available, never signed or filed a counter-affidavit. Since the filing of the sworn statement of Mrs. Socie, Detective Bernat has continually followed her and had her detained by the police in Warren, Ohio, but never had her arrested. To avoid harassment, Mrs. Socie left this district.

"We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation. The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion."

This limited note is not to be considered as approving any part of the "response." The Court of Appeals in this case did *stay the mandate.*

Respectfully submitted,

JOHN J. KANE, JR.,
DAN W. DUFFY,
Attorneys for Defendants.

MEMORANDUM AND ORDER RE: MOTION TO SHOW CAUSE WHY BAIL SHOULD NOT BE REVOKED.

(Filed October 6, 1967.)

KALBFLEISCH, *Ch.J.*

Judgments of conviction of defendants were entered by this Court July 23, 1963 and defendants subsequently appealed unsuccessfully to the United States Court of Appeals for the Sixth Circuit, which affirmed their convictions and later denied rehearing. The Supreme Court of the United States denied defendants' petitions for writs of certiorari on May 27, 1965 and on October 11, 1965 denied rehearing.

Defendants' post-appeal motions for new trials on grounds of newly discovered evidence, filed October 11 and 18, 1965, upon consideration, were overruled by an order of this Court entered December 10, 1965. That

denial was affirmed May 5, 1967 by the United States Court of Appeals for the Sixth Circuit. Defendants' petitions for writs of certiorari filed July 1, 1967 as to these orders are presently pending before the Supreme Court of the United States.

On July 14, 1967, the instant matter came on for hearing upon the Court's order of July 7, 1967 that defendants show cause why bail previously set by this Court pending defendants' appeal should not be revoked.

At the conclusion of the July 14, 1967 hearing the Court inquired of counsel regarding its jurisdiction to decide the original motions for new trials, the Court's purpose being to aid its recollection of the state of the proceedings since bail was originally set. It has come to the Court's attention that counsel for the defendants apparently perceives in that inquiry a potential avenue for a new ground for appeal of the Court's overruling the motions for new trials, when in fact the question posed by the Court was an aside of a purely rhetorical and academic nature only. The Court is therefore constrained to clarify its ruling on the motions for new trials for the benefit of counsel and the record.

At the time defendants' motions for new trials were submitted, the Court's thorough consideration of defendants' moving papers and exhibits compelled the Court to conclude that such motions were utterly without merit and that new trials were not warranted. Under such circumstances, a hearing on the motions would have served no useful purpose and was clearly unnecessary. The Court's decision on the motions for new trials was not predicated upon any doubt as to its jurisdiction to decide such motions.

In the matter presently before the Court, defendants have asserted by brief and argument of counsel that their

petitions for certiorari presently pending before the Supreme Court are not frivolous or for purposes of delay and that the community will not be threatened by their continued release on bail.

The defendants have been available at all court proceedings thus far. The record does not show any finding by a judge in any foregoing proceeding in this case that defendants' appeals to date have not been taken in good faith.

The United States Attorney, upon whose motion the Court's order of July 7, 1967 was entered, has not shown that defendants have violated the conditions of their bail; that the pending appeal is frivolous or for the purpose of delay; or that defendants' continued release will be a threat to the community.

Therefore, defendants' bail will be continued pending disposition of their petitions for writs of certiorari by the United States Supreme Court.

GIRARD E. KALBFLEISCH,
Chief Judge.

IT IS SO ORDERED.

GIRARD E. KALBFLEISCH,
Chief Judge.

Date: October 6, 1967.